No. 88-769

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In The

Supreme Court of the United States

October Term, 1988

JANE HARLAN,

Petitioner,

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Are the federal courts without subject matter jurisdiction to consider the issues raised by Petitioner Harlan's complaint?

2. Did the Court of Appeals err in holding that Petitioner Harlan failed to preserve any objection to the District Court holding that Respondents are immune?

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JANE HARLAN,

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vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Respondents Larry Jackson and Gordon E. Allen respectfully oppose the Petition for Writ of Certiorari to review the opinion and judgment of the United States

Court of Appeals for the Eighth Circuit entered in the above-captioned case on August 12, 1988.

OPINIONS BELOW

Neither the opinion of the Court of Appeals nor the opinion of the District Court has been reported. Both opinions, however, are reproduced in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Petition for Writ of Certiorari invokes this Court's jurisdiction under 28 U.S.C. Section 1254.

PROVISIONS OF RULES INVOLVED

Iowa Sup. Ct. R. 118

Rules of the Grievance Commission of the Supreme Court of Iowa

Rules of Procedure of the Committee on Professional Ethics and Conduct of The Iowa State Bar Association

These rules are set forth in the appendix to the brief in opposition of Respondent, The Committee on Professional Ethics and Conduct of The Iowa State Bar Association.

STATEMENT OF THE CASE

Petitioner Jane Harlan, an Iowa attorney, was appointed guardian ad litem for five children involved in a child-in-need-of-assistance proceeding. Respondent Larry Jackson, as Deputy Commissioner, was the Iowa Department of Human Services official ultimately responsible for foster care placement.[1] Respondent Gordon E. Allen, as Deputy Attorney General for the State of Iowa, was responsible for providing legal advice and representation to Larry Jackson and the Iowa Department of Human Services.

In the course of the performance of these functions, Respondents Jackson and Allen filed an ethics complaint against Petitioner Harlan with the Grievance Commission of the Iowa State Bar Association. The complaint alleged that Petitioner Harlan had violated ethical proscriptions by making extrajudicial statements concerning the pending proceedings and by releasing confidential information. (Pet. App. 23-25) The complaint was investigated by the Committee on Professional Ethics and Conduct. Petitioner Harlan responded to the ethics complaint by asserting a First Amendment defense. (Pet. App. 26-27) The Committee rejected her claims, concluded she had violated disciplinary rules, and sent her notice of its recommendation of public reprimand. (Pet. App. 28-30) The notice informed her that, if she failed to file an exception to the recommendation within thirty days, the

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[1] Larry Jackson has recently left State employment but was employed by the Iowa Department of Human Services at all times relevant to the factual matters asserted by Petitioner Harlan.

reprimand would be spread upon the public records of the Iowa Supreme Court. (Pet. App. 29-30) Had Petitioner Harlan filed an exception, Iowa Supreme Court Rule 118.3 provided that the reprimand would be stricken.[2] (Resp. Committee's App. I) Had Petitioner Harlan filed an exception, no discipline could have been imposed without full hearing before the Grievance Commission and disposition by the Iowa Supreme Court. Iowa Supreme Court Rules 118.3 to 118.11. (Resp. Committee's App. I)

Petitioner Harlan did not file exceptions. Instead, she filed this action in the United States District Court for the Southern District of Iowa against Allen and Jackson and members of the Ethics Committee under 42 U.S.C. § 1983, seeking declaratory and injunctive relief and $1,000,000 in damages, as well as attorney fees. (Pet. App. 17-22) On October 15, 1987, the Iowa Supreme Court issued an Order of Public Reprimand as no exception had been filed by Petitioner Harlan. (Pet. App. 46) Harlan then filed a Petition for Writ of Certiorari in this Court asking

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[2] The Iowa Supreme Court attorney disciplinary procedures are described in the Brief in Opposition filed herein by Respondent Committee on Professional Ethics and Conduct of the Iowa State Bar Association. The appendices to that Brief in Opposition [cited herein as Resp. Committee's App.] contain Iowa Supreme Court Rule 118, the Rules of the Iowa Supreme Court Grievance Commission, and the Rules of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association.

for review of that order of public reprimand; that Petition was not docketed because it was filed out of time.[3]

Meanwhile, the district court dismissed the § 1983 action for lack of subject matter jurisdiction and because all of the defendants were absolutely immune. On appeal to the Court of Appeals for the Eighth Circuit, the only issue Petitioner Harlan raised was whether the district court had subject matter jurisdiction. (Appellant's Brief in the Court of Appeals at 4; Pet. App. 4) The Eighth Circuit held that Petitioner Harlan's failure to challenge the district court's holding that the defendants are absolutely immune from liability was fatal to her appeal. (Pet. App. 4-5) Accordingly, the Eighth Circuit affirmed the district court's dismissal of the complaint. (Pet. App. 1-5) From that affirmance, this Petition for Writ of Certiorari was filed.

REASONS FOR DENYING THE WRIT

I. THERE IS NO VALID REASON TO GRANT THE WRIT OF CERTIORARI.

The Petition for Certiorari raises no important issue which needs to be resolved by this Court. Petitioner Harlan's First Amendment arguments could not be decided in this case. Neither the district court nor the Eighth Circuit reached the merits, because dismissal

[3] Letter from Joseph F. Spaniol, Jr., Clerk, Supreme Court of the United States, to Robert E. Sutton, Esq., January 21, 1988, concerning *Harlan v. Committee on Professional Ethics*.

resulted from lack of jurisdiction and the absolute immunity of Respondents.

The district court granted the motion to dismiss filed by Respondents Jackson and Allen on two different bases: (1) lack of subject matter jurisdiction (Pet. App. 10-13); and (2) the absolute immunity of Jackson and Allen from liability for damages for filing the complaint and assisting with the investigation of the disciplinary action against Petitioner Harlan. (Pet. App. 13)

In this case Petitioner Harlan waived her right to challenge the reprimand in the state court disciplinary proceedings, permitted the order of reprimand to be entered by her default, and then filed a Petition for Writ of Certiorari in this Court after the statutory deadline. Petitioner Harlan is foreclosed from challenging the reprimand by failing to litigate these challenges in the state proceedings and by failing to seek timely review by this Court.

Petitioner Harlan also asks this Court to review the Court of Appeals determination that she had waived any error in the federal district court's conclusion that Respondents were immune.[4] (Petition, pp. 10-11). A decision that a party has not preserved an issue is hardly an important question for this Court to consider. It is clear in the Eighth Circuit that failure to brief an issue on appeal waives that issue. *Borough v. Duluth, Missabe & Iron Range*

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[4] Petitioner Harlan did not present the immunity issue for review either in her statement of issues required by Federal Rule of Appellate Procedure 10(b)(3) or in her brief as required by Federal Rule of Appellate Procedure 28(a)(2).

Ry. Co., 762 F.2d 66, 68-69, n.1 (8th Cir. 1985). *See also Rubek v. Barnhart*, 814 F.2d 1283 (8th Cir. 1987). The merits of the immunity issue are not properly before this Court. A question which was not presented in the Court of Appeals cannot properly be raised as a ground for review in this Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, n.16 (1983).

There is no live case or controversy remaining. Petitioner Harlan abandoned any challenge to the determination that the Respondents are immune from suit. She cannot now challenge that determination, and the Respondents' immunity from suit independently precludes any cause of action for damages.

Any claim for injunctive relief is now moot. The disciplinary proceedings against Petitioner Harlan have been completely concluded and may not now be reviewed by any court. Having taken no exception to the reprimand as provided in Iowa Supreme Court Rule 118.3 (Resp. Committee's App. I), Petitioner Harlan was publicly reprimanded by the Iowa Supreme Court. (Pet. App. 46) The only judicial body vested with jurisdiction to review that decision is this Court. Petitioner Harlan's failure to file a Petition for Writ of Certiorari in time ended the jurisdiction of *any* court to review the circumstances of her disciplinary action, and the reprimand has become a final and conclusive determination. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, n.16 (1983).

As any request for injunctive relief is moot and it is now established that all Respondents are immune from liability, there is no relief that the Court can afford that would be of any practical effect. Thus, there is no case or controversy over which the district court may exercise jurisdiction. *DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164, 168 (1974).

This case falls squarely within the ambit of *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which held that a lower federal court has no subject-matter jurisdiction over constitutional challenges which are inextricably intertwined with a specific state attorney licensing proceeding. There can be no colorable claim that the courts below decided this case in conflict with this Court's decisions with regard to that jurisdictional issue – the only relevant issue in this request for review. Nor is there a split in the Circuit Courts of Appeals that needs to be resolved by this Court.

This case is a straightforward instance of the district court and, subsequently, the Eighth Circuit correctly applying well-established law to arrive at the only jurisdictionally correct result – dismissal of the complaint.

II. THE DISTRICT COURT DECISIONS CONFORMED TO SETTLED LAW IN HOLDING THAT THE FEDERAL COURTS LACKED SUBJECT MATTER JURISDICTION OVER THIS CHALLENGE TO A STATE ATTORNEY DISCIPLINARY PROCEEDING.

The district court held it had no jurisdiction because state court orders disciplining members of its bar "may be reviewed only by the Supreme Court of the United States on certiorari to the state court and not by means of

an original action in a lower federal court," quoting *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, n.16 (1983). (Pet. App. 11)

Petitioner Harlan's action in the federal district court was an impermissible attempt to collaterally attack state judicial proceedings. The district court properly decided that it was without jurisdiction to review state court decisions made in judicial proceedings, even when constitutional claims are raised, as those claims are inextricably intertwined with the Iowa Supreme Court's decision in a judicial proceeding and an opportunity to raise and litigate the constitutional issues was afforded in those judicial proceedings. *Feldman*, 460 U.S. at 483-84, n.16. (Pet. App. 11-13)

This Court has also held that "federal courts should refrain from enjoining lawyer disciplinary proceedings initiated by the state ethics committees if the proceedings are within the appellate jurisdiction of the appropriate State Supreme Court."[5] *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627, 106 S.Ct. 2718, 91 L.Ed.2d 512, 522 (1986), citing *Middlesex*, 457 U.S. 423. Attorney disciplinary proceedings in Iowa are clearly within the appellate jurisdiction of the Iowa Supreme Court. *Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Michelson*, 345 N.W.2d 112 (Iowa 1984).

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[5] At the time she filed the complaint, a timely exception to the reprimand could still have been taken. Abstention by the district court from exercising jurisdiction over the merits of the complaint would have been appropriate at that juncture, due

(Continued on following page)

The district court has subject matter jurisdiction over "general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case." *Feldman, supra,* at 486. *Feldman* clearly establishes, however, that a federal district court does not have jurisdiction over "challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Id.* Review of the latter decisions may only be had in this Court. *Feldman, supra.* Indeed Petitioner Harlan sought review here of the Iowa Supreme Court Order of Reprimand, but her petition for writ of certiorari was dismissed as not timely. *See* note 3, *supra.*

(Continued from previous page)

to the pending state disciplinary proceedings within the jurisdiction of the Iowa Supreme Court against the named plaintiff in the district court action. *See Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); *Younger v. Harris,* 401 U.S. 37 (1971); *see also Pennzoil v. Texaco, Inc.,* 481 U.S. ___, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Moore v. Sims,* 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979); *Ronwin v. Dunham,* 818 F.2d 675 (8th Cir. 1987); *Hensler v. District Four Grievance Committee,* 790 F.2d 290 (5th Cir. 1986). Many courts have declared that the field of state attorney discipline is one that is particularly well suited to the principle of federal non-interference. *See Gipson v. New Jersey,* 558 F.2d 701 (3rd Cir. 1977); *Erdmann v. Stevens,* 458 F.2d 1205 (2d Cir.), *cert. denied* 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed.2d 147 (1972). *See also Anonymous J. v. Bar Association of Erie County,* 515 F.2d 435 (2d Cir. 1975), *cert. denied* 423 U.S. 840, 96 S.Ct. 71, 46 L.Ed.2d 60 (1976); *Anonymous v. Association of the Bar of City of New York,* 515 F.2d 427 (2d Cir. 1975), *cert. denied* 423 U.S. 863, 96 S.Ct. 122, 46 L.Ed.2d 92 (1976). Abstention would also be appropriate in this context under principles articulated in *Burford v. Sun Oil,* 319 U.S. 315 (1943).

Petitioner Harlan alleged that her actions were protected by the First Amendment and could not form the basis for disciplinary action, and she alleged that the disciplinary action was initiated in bad faith to retaliate against her, etc.[6] (Pet. App. 1, 17-22) She did not claim that the disciplinary rules under which she was reprimanded were invalid and unconstitutional on their face.

Clearly, this action involved a challenge to a state-court decision in a particular case arising out of judicial proceedings and any constitutional claims raised by Petitioner Harlan were inextricably intertwined with those judicial proceedings. In *Feldman*, this Court noted:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state-court decision. This the District Court may not do.

460 U.S. at 482, n.16. *See also Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980); *Doe v. Pringle*, 550 F.2d 596, 597 (10th Cir. 1976). Nowhere in her complaint or

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[6] The Petitioner asserts in her Petition that the "bad faith" exception articulated by this Court in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), a case decided on the basis of abstention, is recognized by implication in footnote 16 of *Feldman*, 460 U.S. at 482. Petitioner's Brief p. 9. Respondents find no basis whatsoever for that assertion in footnote 16. The test clearly articulated in *Feldman* instead hinges on whether the constitutional claims are inextricably intertwined with the state court's application of its rules to the circumstances of this Petitioner.

subsequent briefs did Petitioner Harlan make a constitutional challenge to the disciplinary rule as *promulgated* but rather challenged the *application* of the rule to her *particular factual circumstances*, a decision over which the district court lacked jurisdiction. *Worldwide Church of God v. McNair*, 805 F.2d 888 (9th Cir. 1986). *See also Czura v. Supreme Court of South Carolina*, 813 F.2d 644 (4th Cir. 1987).

Dismissal of Petitioner Harlan's complaint was fully consistent with this Court's decisions. In an attempt to suggest a conflict among the circuits, Petitioner Harlan cites two decisions which the district court allegedly ignored in holding that it lacked subject-matter jurisdiction – *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979), and *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975). (Pet. Br. at 10) Both cases were decided before *Feldman*. Each was a facial challenge to bar rules; the complaints did not arise from specific disciplinary proceedings. The *Bauer* case involved federal, not state, court rules. These cases are clearly not in conflict with the decisions in this case.

Thus, the district court properly dismissed the complaint for lack of subject matter jurisdiction.

III. THE DECISIONS BELOW DO NOT RAISE THE QUESTION WHETHER THE COMPLAINT STATES A CAUSE OF ACTION UNDER 42 U.S.C. § 1983.

The first question ostensibly presented for review is whether the complaint states a cause of action under 42 U.S.C. § 1983. The Petition argues certain First Amendment issues. However, these issues are not presented by

the decisions below. Neither the Eighth Circuit nor the district court reached the issue whether the complaint stated a cause of action under § 1983, so that issue is not properly before this Court. (Pet. App. 1-5, 9-14)

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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